Gordon

152706

Comptroller General
of the United States

Washington, D.C. 20548

158309

# Decision

**Matter of:** Intermagnetics General Corporation--
Reconsideration

**File:** B-255741.4

**Date:** September 27, 1994

Marcia G. Madsen, Esq., and Brian W. Craver, Esq., Morgan, Lewis & Bockius, for the protester.
Alan C. Rither, Esq., for Battelle Pacific Northwest Laboratories; and James Tower and Paul R. Davis, Esq., Department of Energy, for the agency.
Daniel I. Gordon, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

## DIGEST

Prior decision that agency was permitted to consider evidence outside the awardee's written proposal in determining the acceptability of that proposal, is affirmed as consistent with General Accounting Office precedent.

## DECISION

Intermagnetics General Corporation (IGC) requests reconsideration of our decision denying its protest of the award of a contract to Oxford Instruments, Inc. under request for proposals (RFP) No. 199308, issued by Battelle Pacific Northwest Laboratories, a management and operating contractor, for the Department of Energy. Intermagnetics Gen. Corp., B-255741.2; B-255741.3, May 10, 1994, 94-1 CPD ¶ 302. IGC contends that our decision was based on an erroneous conclusion of law.

We affirm our decision.

As explained in detail in our initial decision, the RFP sought proposals for the design and fabrication of an ultrahigh field nuclear magnetic resonance (NMR) magnet system, that is expected to advance the state-of-the-art in

this area. In the instructions for proposal preparation, the RFP stated that offerors "shall provide a detailed analysis of the magnetic field parameters, field uniformity, and field stability" and various other technical analyses and calculations.[1]

After evaluation of initial proposals, site visits and discussions, and evaluation of best and final offers (BAFO), the source selection official determined that Oxford's lower-priced BAFO was technically superior to IGC's by a significant margin and represented the best overall value. Based on that determination, award was made to Oxford.

Although IGC's protest challenged various aspects of the source selection decision, the request for reconsideration raises only one: the propriety of the agency's consideration of certain technical analyses which Oxford presented during site visits, but did not reproduce in its proposal.[2] IGC contends that this aspect of our decision is inconsistent with established case law. Because we find that contention erroneous, we affirm our decision.

An agency may properly limit its evaluation to information contained in the four corners of a proposal, and IGC cites decisions in which we have denied protests alleging that the contracting agency should have used information from other sources, such as a pre-award survey, as a substitute for

---

[1]For the sake of brevity, we refer to those analyses and calculations collectively in this decision as the "technical analyses."

[2]Although there was some requested information that Oxford did not provide in any form, whether during the site visits or in its proposal, Battelle concluded that Oxford had substantially complied with the data submission requirement. We found that IGC was not prejudiced by Battelle's flexibility in this regard, since IGC's proposal was also not in complete compliance with the RFP requirements. IGC concedes this latter point, and agrees that, if the data that Oxford conveyed during the site visits could properly be considered, the two proposals were comparable in the degree of compliance with the data submission requirement. The only issue presented by the reconsideration request, therefore, is whether the information provided during the site visits could properly be considered.

information that the solicitation directed offerors to include in their proposal. See, e.g., Numax Elecs. Inc., B-210266, May 3, 1983, 83-1 CPD ¶ 470. IGC is also correct in noting that we have denied protests where the protester complained that the agency erred in not considering orally discussed changes to the protester's proposal, where the protester did not confirm the changes by incorporating them in its BAFO. See, e.g., Recon Optical, Inc., B-232125, Dec. 1, 1988, 88-2 CPD ¶ 544.

These decisions are not inconsistent with our denial of IGC's protest; they stand for the proposition that offerors act at their peril when they fail to include within the four corners of their proposals information required by the solicitation or requested by the agency during discussions, and that such proposals may properly be rejected.[3] See Abacus Enters., B-248969, Oct. 13, 1992, 92-2 CPD ¶ 242. However, we have also consistently held that, in evaluating proposals, contracting agencies may consider any evidence, even if that evidence is entirely outside the proposal (and, indeed, even if it contradicts statements in the proposal), so long as the use of the extrinsic evidence is consistent

[3]Along the same lines, we have consistently held that agencies have the discretion to eliminate from the competitive range proposals which do not include information required by the solicitation. IGC cites decisions of our Office that stand for this proposition, including SRI Int'l, Inc., B-250327.4, Apr. 27, 1993, 93-1 CPD ¶ 344, and appears to suggest that these decisions mean that agencies are required to eliminate such proposals from the competitive range. We disagree. The fact that an agency reasonably may eliminate a proposal from the competitive range for failure to include, within the four corners of the written proposal, information required by the solicitation does not mean that the agency would be acting improperly if it included that proposal in the competitive range.

with established procurement practice.[4] See, e.g., Western Medical Personnel, Inc., 66 Comp. Gen. 699 (1987), 87-2 CPD ¶ 310; AAA Eng'g & Drafting, Inc., B-250323, Jan. 26, 1993, 93-1 CPD ¶ 287.

Our initial decision is consistent with this precedent in finding that Battelle could properly consider the technical analyses that Oxford presented during the site visits in determining that Oxford's proposal was acceptable, so long as doing so was not unreasonable or inconsistent with the solicitation evaluation criteria.[5] Other than arguing that such consideration was per se improper, IGC has not demonstrated that Battelle acted unreasonably or in any way inconsistent with the RFP evaluation criteria in considering the technical analyses presented during the site visits.[6]

---

[4]A similar approach applies in other contexts as well. Thus, in the context of a brand name or equal solicitation, a bid for an allegedly equal product must generally show conformance to the brand name product's salient characteristics through descriptive literature submitted with the bid. See Federal Acquisition Regulation (FAR) § 52.214-21. Yet, our Office has long held that, where the descriptive literature submitted with the bid does not show conformance, the contracting agency may base a determination of conformance on "any other information available to the contracting agency," even if that information was not included in the bid. See Barnard & Assocs., B-253367, Sept. 13, 1993, 93-2 CPD ¶ 157. While permitted to consider such information, the agency is not required to go back to the offeror to request it. Envtl. Conditioners, Inc., B-188633, Aug. 31, 1977, 77-2 CPD ¶ 166.

[5]As an example of the ways in which established procurement practice might limit the use of extrinsic evidence, we have held that, where extrinsic evidence is relied upon to find a proposal technically unacceptable due to a correctable deficiency, the offeror must generally be given the opportunity, if discussions are held, to explain or correct the deficiency. See, e.g., Univox California, Inc., B-210941, Sept. 30, 1983, 83-2 CPD ¶ 395. Because consideration of Oxford's oral presentations helped the offeror, that constraint is not relevant here; accordingly, as discussed in the text, the agency was free to consider the information gleaned during the site visits subject to the general constraint that its evaluation be reasonable and consistent with the solicitation evaluation criteria.

[6]As pointed out in our initial decision, the technical analyses provided during the site visits played only a limited role in this procurement. The RFP evaluation

(continued...)

IGC further argues that it was prejudiced by the agency's consideration of information presented during site visits to Oxford. We agree that prejudice to a competitor could render unreasonable the consideration of information outside the written text of a proposal.[7] We reject IGC's claim, however, that such prejudice arose here.

IGC's claim of prejudice is based on the expense that Oxford was allegedly spared through Battelle's "waiver," for Oxford only, of the RFP requirement for written submission of the technical analyses. IGC argues that Oxford's savings were demonstrated by its being allowed to present "a slide show, a far less costly proposition" than written submissions, and that Battelle "failed to inform IGC of this cost saving option." Yet, as noted above, IGC concedes that what it refers to as Oxford's "slide show," if included in Oxford's proposal, would have rendered that proposal as fully compliant as IGC's proposal; IGC does not argue that Oxford's site visit presentations were based on less research, less detailed calculations, or less exhaustive analyses than those performed by IGC. What Oxford "saved," then, was the cost of printing a series of overhead projector images and including them in its proposal. Even

---

[6](...continued)
criteria did not address the technical analyses at all, and they were not evaluated, nor does IGC argue that they should have been. It was the offeror's technical approach for the NMR magnet system, not the technical analyses, which was rated under the RFP evaluation scheme. The technical analyses were apparently treated more as indicators of the offeror's general competence and capabilities, effectively a matter of responsibility, and it is plainly proper to consider information outside an offeror's proposal in reaching a determination about an offeror's responsibility. See FAR §§ 9.104, 9.105-1.

[7]IGC argues that consideration of Oxford's technical analyses was also improper because only one member of the source evaluation board attended one of the site visits, some of the information was presented only orally, and the evaluation was performed several months after the site visits. Particularly in view of the marginal role played by the technical analyses in proposal evaluation, we do not view these matters as bearing on the reasonableness of the evaluation.

if such savings did occur, the obviously minimal cost involved provides no basis to suggest that IGC was placed at a competitive advantage or otherwise prejudiced.[6]

The decision is affirmed.

for Robert P. Murphy
Acting General Counsel

[6]IGC requests that it be awarded its proposal preparation costs even if the protest is not sustained because it was unfairly induced to incur the substantial costs of preparing a detailed proposal. We deny this request, both because of our finding that IGC was not treated unfairly and because we are not authorized to find a protester entitled to such costs unless we find a protest meritorious, which is not the case here. See 31 U.S.C. § 3554(c) (1988).